Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 2005

MARVIN RUBENSTEIN and ISAAC RUBENSTEIN,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari From the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

The petitioners, who were not in the business of asbestos removal, were indicted on felony charges arising from their removal of asbestos pipe insulation, without complying with work practice standards promulgated pursuant to the Clean Air Act, during renovation of a 100-year-old building owned by their family. Relying on Second Circuit caselaw holding that a "reasonable person" may be presumed to know that asbestos is a dangerous substance likely to be subject to governmental regulation, the district court instructed the jury that the government did not have to prove that petitioners were aware of the work practice standards, but that the petitioners should be found guilty if the government proved that they were aware of the circumstances of the removal and that the substance being removed was asbestos. Uncontradicted testimony of government witnesses had established that, while the dust containing asbestos was flowing through the air, the petitioners exposed themselves to contact with it without wearing masks or protective clothing.

The question presented for review is: Whether, given this Court's longstanding recognition that individuals should not be subjected to criminal sanctions if they lack a culpable *mens rea*, should the district court have granted a defense request to instruct the jury that, if the evidence did not establish beyond a reasonable doubt that the petitioners bore a "reasonable person's" awareness of the dangerous and regulated nature of asbestos, the petitioners should be found not guilty.

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Granting a writ of certiorari will permit this Court to resolve a conflict between the decision below and relevant decisions of this Court; additionally, in the context of environmental offenses in which the government has broad discretion to pursue either civil or criminal sanctions, it will enable this Court to resolve whether, consistent with fundamental principles of criminal culpability, a jury should be permitted to reject a presumption regarding guilty knowledge and to acquit a defendant whose non-compliance with environmental regulations is not accompanied by *mens rea*

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No.

In the

SUPREME COURT of the UNITED STATES

MARVIN RUBENSTEIN and ISAAC RUBENSTEIN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Marvin Rubenstein and Isaac Rubenstein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 31, 2005.

Opinion Below

The opinion of the Court of Appeals, *United States v. Rubenstein*, 403 F.3d 93 (2d Cir. 2005), appears as Appendix A to this petition. That court's order, entered April 28, 2005, denying a petition for rehearing is not yet reported and appears as Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 31, 2005. The Court of Appeals denied a timely petition for rehearing by an order entered on April 28, 2005. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Code, Title 42, Section 7413(c)(1), provides, in pertinent part:

> Any person who knowingly violates . . . any requirement or prohibition of . . . section 7412 of this title . . . shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both.

United States Code, Title 42, Section 7412, provides, in pertinent part:

> (b)(1) . . . The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

* * *

CAS Number 1332214 Asbestos

* * *

(d)(1) . . . The Administrator [of the Environmental Protection Agency ("EPA")] shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants . . . .

STATEMENT

I. The Charges and Trial

The criminal charges against Marvin and Isaac Rubenstein, who are father and son, concerned the removal of asbestos that had been used to insulate pipes in a 100-year-old commercial building located in Brooklyn that had been owned by the Rubenstein family for over 30 years. Throughout those years, the family ran a sweater-knitting business in that building, at which Marvin and his mother, Bella Rubenstein, worked full-time, and in which Isaac assisted on a part-time basis as needed. The indictment alleged that, while performing renovations to prepare the building for occupancy by a real estate developer who entered into a long-term lease for the building in July 2000, Marvin and Isaac caused the removal of asbestos without complying with the regulatory standards imposed pursuant to the Clean Air Act ("CAA"), in

violation of 42 U.S.C. § 7413(c)(1), and that they conspired to do so, in violation of 18 U.S.C. § 371.

At trial, a government expert explained that work standard practices, codified in the National Emissions Standards for Hazardous Air Pollutants ("NESHAPS") promulgated by the EPA, require that asbestos removed from pipes must be wetted and disposed of in leak-proof containers under the supervision of a certified asbestos contractor who has received training in the NESHAPS, and that the workers removing the asbestos must wear protective gloves and clothing, as well as masks or respirators. These regulations do not apply to all demolition involving material containing asbestos; rather, they apply only if the renovation entails removal of at least 260 linear feet of "regulated asbestos containing material" ("RACM"), which is defined as:

> (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations . . .

40 C.F.R. § 61.141

Appearing as a government witness, the real estate developer, Erik Ekstein, testified that, although no provision concerning asbestos was included in the lease, Marvin